

**IN THE CIRCUIT COURT OF TYLER COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION**

**DIRECTIONAL ONE SERVICES, INC. USA,
a foreign corporation authorized to do business
in the State of West Virginia,**

Plaintiff,

vs.

**Civil Action No. 18-C-14
Presiding Judge: H. Charles Carl, III
Resolution Judge: Christopher C. Wilkes**

**ANTERO RESOURCES CORPORATION,
a foreign corporation authorized to do business
in the State of West Virginia,**

Defendant.

ORDER GRANTING PLAINTIFF'S FOURTH MOTION TO COMPEL

This matter came before the Court this 3rd day of June, 2019, upon Plaintiff's Fourth Motion to Compel. The Plaintiff, Directional One Services Inc. USA, by counsel, Sean P. McGinley, Esq., and Defendant, Antero Resources Corporation, by counsel, W. Henry Lawrence, Esq., have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. This matter was commenced with the filing of the Complaint on April 6, 2018¹, alleging claims of Breach of Contract (Count I); Lien Foreclosure (Count II); Estoppel (Count III); Mutual Mistake/Equitable Reformation of Contract (Count IV);

¹ The Court notes the court file reflects that a First Amended Complaint with Jury Demand was filed April 19, 2018, but the causes of action are the same.

and Negligent Misrepresentation (Count V). *See* Compl. ¶¶ 44-79. The allegations involve a dispute between Plaintiff, Directional One Services Inc. USA (hereinafter “Plaintiff”), a directional drilling contractor, and Defendant, Antero Resources Corporation (hereinafter “Defendant”), an oil and gas well owner and operator. *See* Pl’s Mot., p. 3.

2. On August 3, 2018, Defendant filed its Answer and Counterclaim, alleging Breach of Contract for Lost In Hole Charges (Count I); Breach of Contract for Lost In Hole Insurance Charges (Count II); Breach of Contract for Repair Charges (Count III); and Breach of Contract for Day-Rate and Standby Charges (Count IV). *See* Counterclaim, ¶¶ 40-28.
3. On a prior day, a deposition was held in this litigation, whereby counsel for Defendant questioned a former employee of Defendant as to what actions he would have taken had he received legal advice from Defendant’s in-house counsel. *See* Pl’s Mot., p. 1.
4. On April 10, 2019, Plaintiff filed the instant Plaintiff’s Fourth Motion to Compel, seeking access to previously designated privileged documents on the basis that this line of questioning opened the door to Plaintiff to inquire as to the “complete advice” that was given and to know whether that advice was qualified or changed over time. *Id.*
5. On April 19, 2019, Defendant filed its Response in Opposition to Directional One Services Inc. USA’s Fourth Motion to Compel, arguing attorney-client privilege was not waived, that its confidential communications between Defendant and its counsel

are still protected by attorney-client privilege, and that a former employee cannot waive attorney client privilege for the defendant corporation. *See* Def's Resp., p. 1.

6. On May 1, 2019, Plaintiff filed its Reply Brief in Support of Fourth Motion to Compel.

7. The Court finds this issue is now ripe for adjudication

CONCLUSIONS OF LAW

8. Plaintiff seeks to compel documents Defendant previously identified in its privilege log, which was attached as Exhibit 1 to the instant Motion to Compel. *See* Pl's Mot., p. 1. Specifically, Plaintiff seeks production of confidential communications between Defendant and its counsel regarding the Jameson 1H invoice 101600, including documents identified in the privilege log. *See* Def's Resp., p. 1. Plaintiff alleges the Jameson 1H LIH invoice 101600 was the subject matter or transaction for which the in-house counsel's advice was given. *See* Pl's Mot., p. 3. Additionally, Plaintiff claims "[a]dditional documents" may also be within the scope of the waiver and therefore subject to an order granting the motion to compel. *Id.* at 4.

9. On a prior day, the deposition of Eric Eddy was held in this litigation. *Id.* at 2; *see also Id.* at Ex. 2. Eddy was formerly a Director of Drilling – Operations for Defendant. *Id.* During the deposition, Eddy was questioned by counsel for Defendant, John Pizzo. *Id.* During questioning by Mr. Pizzo, Eddy revealed advice given to him by an Attorney Cosgriff, who was acting as in-house counsel for Defendant. *Id.* Specifically, Mr. Pizzo asked Eddy if his conduct in dealing with Plaintiff would have been different had he received Mr. Cosgriff's advice at an earlier date. *Id.* Further, Plaintiff alleges the Jameson 1H LIH invoice 101600 was the subject matter or transaction for which Mr. Cosgriff's advice was given, including all matters bearing on how the advice came into being (as opposed to just the finished product), and all aspects of the

advice which support, contradict, or weaken the advice that Mr. Eddy disclosed in the deposition. *Id.* at 3.

10. Plaintiff contends the result of this testimony is that Defendant has now made the advice of counsel a part of its affirmative case against Plaintiff (in its counterclaims), as well as part of its defenses to Plaintiff's claims. *Id.* at 2. For this reason, Plaintiff argues the door has been opened for it to discover as to the complete legal advice given, and that Defendant has waived attorney-client privilege. *Id.* at 1-2.

11. In response, Defendant contends attorney-client privilege was not waived, that its confidential communications between Defendant and its counsel are still protected by attorney-client privilege, and that Mr. Eddy, as a former employee, cannot waive attorney client privilege for the defendant corporation. *See* Def's Resp., p. 1.

12. Generally speaking, the discovery process allows litigants to obtain materials that are critical to the proof of their case. As such, materials that are relevant and probative to the asserted claim, or any defenses thereto, usually are discoverable.

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

W. Va. R. Civ. P. 26(b)(1). *cited by State of W. Virginia ex rel. Allstate Ins. Co. v. Madden*, 215 W. Va. 705, 712–13, 601 S.E.2d 25, 32–33 (2004).

13. Additionally, in order to protect the sanctity of certain relationships, precise exceptions have been established to limit or prohibit access to evidence generated in the course of said communications. *Id.* at 713, 33.

14. “In clear language, Rule 26 of the West Virginia Rules of Civil Procedure provides that privileged matters, although relevant, are not discoverable. As a result of this rule, many documents that could very substantially aid a litigant in a lawsuit are neither discoverable nor admissible as evidence. In determining what privileges or protections are applicable, we are obligated to look both at the rules themselves and to our statutory and common law.” Syllabus point 12, *State ex rel. Medical Assurance of West Virginia, Inc. v. Recht*, 213 W.Va. 457, 583 S.E.2d 80 (2003).

15. One of the special relationships to which these privileges apply is the attorney-client relationship. *Madden*, at 713, 33. Confidential communications made by a client or an attorney to one another are protected by the attorney-client privilege.” Franklin D. Cleckley, Robin J. Davis, & Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure* § 26(b)(1), at 693 (4th ed.2012) *cited by State ex rel. Montpelier U.S. Ins. Co. v. Bloom*, 233 W. Va. 258, 264, 757 S.E.2d 788, 794 (2014); *see also Upjohn Co. v. U.S.*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) (stating that attorney-client privilege is “the oldest of the privileges for confidential communications known to the common law”).

16. It also has been recognized that “[t]he fact that the client is a corporation does not vitiate the attorney-client privilege.” *Southeastern Pennsylvania Transp. Auth. v. Caremarkpcs Health*, 254 F.R.D. 253, 257 (E.D.Pa.2008) *cited by State ex rel. Montpelier U.S. Ins. Co. v. Bloom*, 233 W. Va. 258, 264, 757 S.E.2d 788, 794 (2014).

17. “In order to assert an attorney-client privilege, three main elements must be present:

(1) both parties must contemplate that the attorney-client relationship does or will exist; (2) the advice must be sought by the client from that attorney in his capacity as a legal adviser; (3) the communication between the attorney and client must be identified to be confidential.’ Syllabus Point 2, *State v. Burton*, 163 W.Va. 40, 254 S.E.2d 129 (1979).” Syllabus point 7, *State ex rel. United States Fidelity & Guaranty Co. v. Canady*, 194 W.Va. 431, 460 S.E.2d 677 (1995).

18. However, “[a] party may waive the attorney-client privilege by asserting claims or defenses that put his or her attorney's advice in issue.” Syl. pt. 8, *United States Fid. & Guar. Co. v. Canady*, 194 W.Va. 431, 460 S.E.2d 677.

19. The West Virginia Supreme Court of Appeals discussed various ways a party may waive the attorney-client privilege in *State ex rel. U.S. Fid. & Guar. Co. v. Canady*. There, the Court considered a case wherein it was held that where a party claimed that its tax position was reasonable because it was based on advice of counsel puts the advice in issue and waives privilege. 194 W. Va. 431, 442, 460 S.E.2d 677, 688 (1995). In *Canady*, Justice Cleckley explained:

“A party may waive the attorney-client privilege by asserting claims or defenses that put his or her attorney's advice in issue. The classical example is where an attorney is sued by a client for legal malpractice. See 8 Wigmore, *supra* § 2327 at 638. A defendant also may waive the privilege by asserting reliance on the legal advice of an attorney. *Hunt*, 128 U.S. at 470, 9 S.Ct. at 127, 32 L.Ed. at 491 (client waived privilege when she alleged as a defense that she was misled by counsel); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156 (9th Cir.1992) (party's claim that its tax position was reasonable because it was based on advice of counsel puts advice in issue and waives privilege). See generally, Cleary, *supra* § 93 at 223–24.”

Id.

20. Further, the law addresses inadvertent disclosures. Inadvertent disclosure during discovery is not in and of itself a waiver of the attorney-client privilege; rather, trial courts must consider (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view

of the extent of document production, (2) the number of inadvertent disclosures, (3) the extent of the disclosures, (4) the promptness of measures taken to rectify the disclosure, (5) the interest of justice by relieving the party of its error and (6) any other relevant factors. Syl Pt. 14, *State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W. Va. 358, 508 S.E.2d 75 (1998).

21. The party inadvertently disclosing attorney-client privileged communication bears the burden of showing by a preponderance of evidence that the communication should retain its privileged status. *Id.* at 95-96.

22. Here, the issue is whether or not Defendant “opened the door” during the deposition, effectively waiving attorney-client privilege, when counsel for Defendant asked the deponent Mr. Eddy, a former employee of Defendant, a line of questions regarding advice he was given by Defendant’s in-house counsel.

23. The Court finds that given the relevant case law, attorney-client privilege was effectively waived when counsel for Defendant decided to question Mr. Eddy about the legal advice he received. Defendant cannot be permitted to selectively disclose part of the subject advice and rely upon it to elicit testimony from a witness, while denying Plaintiff access to the totality of it.

24. The Court considers the fact that Defendant’s counsel formulated questions to the client executive witness that concerned describing the legal advice he was given, and directly asking him to explain his conduct in light of the legal advice (specifically asking him to state what he would have done differently). Once Defendant opened this door, Plaintiff is entitled to look behind it and discover any relevant evidence found there.

25. This is not a case in which the inadvertent disclosure exception to waiver of attorney-

client privilege would apply. There was no reasonableness of precautions to prevent inadvertent disclosure in this case because it was Defendant's own counsel who crafted and went through the line of questioning related to Defendant's conversation regarding advice with Defendant's in-house lawyer. The Court's analysis into inadvertent disclosure need not go any further.

26. The Court considers notions of fairness in its decision to not permit the partial disclosure of a privileged communication while allowing Defendant to maintain privilege as to the remainder. As described in the American Bar Association's Epstein, Volume I, *The Attorney-Client Privilege and the Work-Product Doctrine* at 407 (5th ed. 2007): "In an adversarial, litigated matter, a party may not disclose or use one privileged document on a particular subject matter and retain the privilege as to the rest. If you are going to show your cards, you have to show them all...".

27. The Court further recognizes and finds that this case is not the same as cases in which a party relies upon advice of counsel as an affirmative defense; however, this Court's research has determined the situations are analogous for the purposes of analyzing the principles of waiver under our existing jurisprudence. Defendant made a choice to make use of a purported disclosure of legal advice in order to advance its own claims or defenses by deliberately crafting the line of questioning related to the same at the deposition. Accordingly, Plaintiff should be entitled to a complete disclosure of this legal advice. Defendant cannot be permitted to "manipulate the privilege so as to release only favorable information and withhold anything else." *JJK Mineral C. v. Swiger*, 292 F.R.D. 232, 333 (N.D. W.Va. 2013).

28. Although Defendant argues that a former employee² cannot waive attorney-client

² The Court notes Defendant cites only an out-of-state, federal case to stand for the premise that a former employee cannot waive attorney-client privilege for a corporation, *Southwire Co. v. Essex Grp., Inc.*, 570 F.Supp. 643, 645 (N.D. Ill. 1983). See Def's Resp., p. 3.

privilege (*see* Def's Resp., p. 2-3), the Court considers the fact that it was counsel for Defendant who elicited this line of questioning from Mr. Eddy, the former employee of Defendant. For this reason, the Court does not find Defendant's argument persuasive. Further, notwithstanding Mr. Eddy's status as a former employee, the waiver was confirmed by Defendant's employee and representative at the deposition, Mr. Cosgriff, who confirmed on the record that he had given the legal advice in question. *See* Pl's Third Mot. to Compel, Ex. 2.

29. The Court also notes that it has been proffered that Mr. Eddy lives outside of this jurisdiction, and it is likely that his deposition testimony will be his trial testimony. For that reason, his disclosure of legal advice may be the equivalent of a disclosure made before the jury at trial. It is only fair if Defendant is allowed to advance that line of questioning, that Plaintiff be able to question and present evidence as to what the full advice on the topic was.

30. The Court finds that a waiver of attorney-client privilege occurred in the deposition transcript reflected in the partial transcript attached to Plaintiff's motion as an exhibit. Defendant shall disclose the matters set forth in the privilege log, made an exhibit to the Motion to Compel, within fifteen (15) days of the entry of this Order.

CONCLUSION

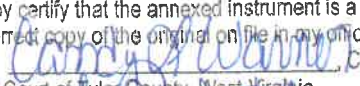
Accordingly, it is hereby ADJUDGED and ORDERED that Plaintiff's Fourth Motion to Compel is hereby GRANTED. Defendant is ORDERED to disclose the matters set forth in its privilege log, made an exhibit to the motion to compel, within fifteen (15) days of the entry of this Order. The Court notes the objections and exceptions of the parties to any adverse ruling herein. The Clerk shall enter the foregoing and forward attested copies hereof to all counsel, and to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

ENTERED this 3rd day of June, 2019.



JUDGE H. CHARLES CARL, III
West Virginia Business Court Division

I hereby certify that the annexed instrument is a true
and correct copy of the original on file in my office.

Attest:  Clerk
Circuit Court of Tyler County, West Virginia

By:  Deputy